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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RYAN Q. CLARIDGE,

Plaintiff,

vs.

I-FLOW CORPORATION, a Delaware corporation; I-FLOW, LLC, a Delaware limited liability company; DJO LLC (f.k.a. DJ ORTHOPEDICS, LLC), a Delaware limited liability company; DJO, INCORPORATED, aka DJO, INC., a Delaware corporation; STRYKER CORPORATION, a Michigan corporation; and STRYKER SALES CORPORATION, a Michigan corporation,

Defendants.

CASE NO.: 2:18-cv-01654-GMN-PAL

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS STRYKER'S AND I-FLOW'S MOTIONS TO DISMISS AND STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT

(Hearing Requested)

Plaintiff, Ryan Q. Claridge, through counsel, opposes the Motion to Dismiss and Strike Portions of the Complaint by Defendants Stryker Corporation and Stryker Sales Corporation and Memorandum of Points and Authorities in Support (doc. 16) and Defendant I-Flow Corporation's Motion to Strike and Dismiss Portions of Plaintiff's Complaint (doc. 19), on the following grounds:

INTRODUCTION

Ryan Claridge is a former linebacker for the New England Patriots. After a stellar collegiate career at UNLV, Ryan was drafted by the Patriots in the fifth round of the 2005 NFL draft. He suffered a

left shoulder injury during the Patriots' training camp and had shoulder surgery in August 2005. He spent the 2005 season on the Patriots' practice squad. Instead of getting better, his shoulder got worse, and in January 2006 he had a second, exploratory arthroscopic examination of his left shoulder. At the end of his first surgery, his surgeon (Dr. Randall Yee) inserted an On-Q pain pump manufactured and sold by Defendant I-Flow into Ryan's left shoulder joint, to try to control post-operative pain. After his second surgery, his surgeon inserted into Ryan's left shoulder a pain pump manufactured and sold by Defendant Stryker Corporation. Pain pumps, which were designed for post-operative pain relief in other parts of the body, cause severe and permanent injuries when inserted into the shoulder joint. The anesthetics they infuse into the enclosed joint space kill the chondrocytes in the shoulder cartilage, leaving the patient with bone on bone, eventually requiring shoulder joint replacement surgery.

The FDA never approved pain pumps for use in the joint (or "intra-articular") space. In fact, it had specifically rejected requests from manufacturers to approve pain pumps for use in the joint space.

Ryan brought this action against the manufacturers and distributors of the two pain pumps used in his shoulder surgeries (I-Flow and Stryker), alleging claims for (1) strict products liability, (2) negligence, (3) breach of express warranty, (4) breach of implied warranty of merchantability, (5) breach of implied warranty of fitness for a particular purpose, and (6) misrepresentation and fraudulent concealment.[1] The Defendants have moved to dismiss the implied warranty claims and the misrepresentation and fraudulent concealment claim (claims 4-6) and the Plaintiff's prayer for punitive damages with prejudice as insufficiently pleaded. The Court should deny the motion, as this Court and other courts considering similar motions against these same defendants have done.[2] The Plaintiff has sufficiently pleaded all of the challenged claims for relief, as shown more fully below.

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[1] *See* Compl. & Jury Demand, doc. 1.

[2] *See, e.g., Gullett v. I-Flow Corp.,* No. 0:12-cv-00069-HRW, doc. 14 (E.D. Ky. Feb. 21, 2013) (denying motion to dismiss claims for fraud and negligent misrepresentation and punitive damages); *Wright v. Stryker Corp.,* No. 12-3291-CV-S-RED, doc. 28 (W.D. Mo. Sept. 20, 2012) (denying motion to

ARGUMENT

I. The Legal Standard

A plaintiff is not required to prove his case at the pleading stage. Except for claims involving a heightened pleading standard, such as fraud claims, a complaint will survive a motion to dismiss for failure to state a claim as long as it satisfies the notice pleading standard of Federal Rule of Civil Procedure 8(a)(2).[3] Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the

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dismiss claims for fraud, negligent misrepresentation, and punitive damages); *Rossum v. I-Flow Corp.*, Civ. No. 09-3714 (JNE/LIB), doc. 93, 2011 WL 3274080 (D. Minn. Aug. 1, 2011) (denying motion to dismiss negligent misrepresentation and fraud and implied warranty counts); *Troyer v. I-Flow Corp.*, No. 1:11-CV-00045, doc. 13, 2011 WL 2517031 (S.D. Ohio June 23, 2011) (denying a motion to dismiss, *inter alia*, breach of implied warranty and punitive damage claims); *Vialpando v. Stryker Corp.*, No. 2:10-cv-0028-LDG-PAL, doc. 24, 2011 WL 1042348 (D. Nev. Mar. 21, 2011) (denying a motion to dismiss a request for punitive damages); *Cantonis v. Stryker Corp.*, Civ. No. 09-3509 (JRT/JJK), 2011 WL 1084971 (D. Minn. Mar. 21, 2011) (denying a motion to dismiss, *inter alia*, fraud and implied warranty claims); *James v. Stryker Corp.*, No. 1:10-CV-2082, doc. 24, 2011 WL 292240 (M.D. Pa. Jan. 27, 2011) (denying a motion to dismiss a fraud claim); *Burdine v. Stryker Corp.*, 766 F. Supp. 2d 837 (N.D. Ohio 2011) (denying a motion to dismiss a punitive damage claim); *McIntosh v. Stryker Corp.*, Civ. No. 10-3419 (MJD/FLN), doc. 18, 2010 WL 4967820 (D. Minn. Dec. 1, 2010) (denying a motion to dismiss, *inter alia,* claims for negligent misrepresentation, fraud, and breach of implied warranty); *Partridge v. Stryker Corp.*, Civ. No. 10-1003 (MJD/AJB), doc. 36, 2010 WL 4967845 (D. Minn. Dec. 1, 2010) (denying a motion to dismiss, *inter alia*, fraud and breach of implied warranty claims); *Ridings v. Stryker Sales Corp.*, Civ. No. 10-2590 (MJD/FLN), doc. 27, 2010 WL 4963064 (D. Minn. Dec. 1, 2010) (denying a motion to dismiss, *inter alia*, claims for negligent misrepresentation and fraud); *Strong v. Stryker Corp.*, Civ. No. 10-2315 (MJD/FLN), doc. 25, 2010 WL 4967876 (D. Minn. Dec. 1, 2010) (denying a motion to dismiss, *inter alia,* claims for fraud, negligent misrepresentation, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose); *Smith v. I-Flow Corp.*, 753 F. Supp. 2d 744 (N.D. Ill. 2010) (denying a motion to strike a request for punitive damages); *Mack v. Stryker Corp.*, Civ. No. 10-2993 (PAM/JJG), doc. 16, 2010 WL 4386898 (D. Minn. Oct. 28, 2010) (denying a motion to dismiss, *inter alia*, claims for fraud and for breach of implied warranties); *Clonch v. I-Flow Corp.*, No. 1:10-CV-00348, doc. 26, 2010 WL 4806769 (S.D. Ohio Nov. 17, 2010) (denying a motion to dismiss breach of warranty and punitive damage claims); *Lefker v. I-Flow Corp.*, No. 1:10-CV-00350, 2010 WL 4806771 (S.D. Ohio Nov. 17, 2010) (same); *Mayle v. Stryker Corp.*, No. 5:09 CV 1991, doc. 48, 2010 WL 1170635 (N.D. Ohio Mar. 23, 2010) (denying a motion for partial dismissal of a punitive damage claim); *Rusin v. I-Flow, LLC*, No. 11 CV7409 (Colo. Dist. Ct., City & Cnty. of Denver, Aug. 3, 2012) (denying a motion to dismiss breach of implied warranty and fraud and negligent misrepresentation claims). *See also Cox v. DJO, LLC*, Civ. No. 07-1310-AA, doc. 258 (D. Or. July 7, 2009) (granting plaintiff's motion to amend to add a punitive damage claim against I-Flow).

[3] *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1102-03 (9th Cir. 2008).

pleader is entitled to relief," not detailed factual allegations.[4] On a motion to dismiss, the Court must take all of the facts in a complaint as true[5] and construe them in the light most favorable to the non-moving party,[6] drawing all reasonable inferences in his favor.[7] The Court should deny the motion as long as the complaint has enough factual matter to "state a claim to relief that is plausible on its face."[8] A claim has facial plausibility when the facts alleged by the plaintiff would allow the court to "draw the reasonable inference, based on the court's judicial experience and common sense, that the defendant is liable for the alleged misconduct."[9] A complaint may be well pleaded even where "it strikes a savvy judge that actual proof of the facts alleged is improbable, and 'that a recovery is very remote and unlikely.'"[10] Where, as here, the complaint's concrete allegations state a claim for relief, a case should not be dismissed under Rule 12(b)(6) unless "'it appears beyond doubt that the non-movant can prove no set of facts to support its claims.'"[11] The Plaintiff's complaint provides sufficient facts for one to draw the reasonable inference that the Defendants are liable for the claims alleged.

Furthermore, dismissal would be improper without granting the Plaintiff leave to amend.[12]

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[4] *Reed v. Arthrex, Inc.*, No. 3:17-cv-00337-LRH-WGC, 2017 WL 4560140, at *3 (D. Nev. Oct. 11, 2017) (quoting FED. R. CIV. P. 8(a)(2)).

[5] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

[6] *E.g., Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

[7] *E.g., Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles,* 648 F.3d 986, 991 (9th Cir. 2011) (citations omitted and internal quotation marks omitted).

[8] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

[9] *Reed*, 2017 WL 4560140, at *4 (citing *Ashcroft*, 556 U.S. at 678-79).

[10] *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Twombly*, 550 U.S. at 556, which in turn was quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

[11] *Ass'n for Los Angeles Deputy Sheriffs*, 648 F.3d at 991 (citation omitted). *See also Twombly*, 550 U.S. at 563 (the "no set of facts" language describes "the breadth of opportunity to prove what an adequate complaint claims").

[12] *Manzarek*, 519 F.3d at 1031 ("Dismissal without leave to amend is improper unless it is *clear* . . . that the complaint could not be saved by *any* amendment.") (citations omitted and emphasis added).

II. The Court Should Deny the Motions to Dismiss the Plaintiff's Warranty Claims Because Privity of Contract Is Not Required in a Case Like This.

The Defendants have moved to dismiss the Plaintiff's breach of implied warranty claims (claims 4 and 5) on the grounds that there was no privity of contract between them and the Plaintiff, since the pain pumps were sold to the health-care providers and not directly to the Plaintiff. The Defendants rely on *Finnerty v. Howmedica Osteonics Corp.*[13] for this argument. *Finnerty* is not authoritative. The defendant in that case moved for summary judgment on the plaintiff's breach of implied warranty claims on the grounds that there was no contractual privity between the defendant (a medical device manufacturer) and the plaintiff (a patient who had the device implanted in him). The court did not decide the issue on the merits but granted the motion in effect by default because the plaintiff failed to respond to the argument or to present any evidence.[14]

This Court was later squarely faced with the issue in *Reed v. Arthrex, Inc.*[15] In that case, the plaintiffs sued the manufacturer of a medical device (an internal-fixation plate) that failed. They claimed, among other things, breach of implied warranties. As here, the defendant moved to dismiss on the grounds that there was no privity between it and the plaintiffs. It argued that "Nevada law clearly required privity for an implied-warranty claim,"[16] citing *Long v. Flanigan Warehouse Co.*[17] (another case cited by Defendants) and *Amundsen v. Ohio Brass Co.*[18] The Court, however, agreed with the plaintiffs that privity was not required in *Reed.*[19]

The Court noted the distinction between vertical and horizontal privity. ***Vertical*** privity involves relationships up and down the chain of distribution. ***Horizontal*** privity, on the other hand, involves a

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13 No. 2:14-cv-00114-GMN-GWF, 2016 WL 4744130 (D. Nev. Sept. 12, 2016).

14 *See id.* at *22.

15 No. 3:17-cv-00337-LRH-WGC, 2017 WL 4560140 (D. Nev. Oct. 11, 2017).

16 *Id.* at *10 (citing *Long* and *Amundsen v. Ohio Brass Co.*, 513 P.2d 1234 (Nev. 1973), another case involving horizontal privity).

17 382 P.2d 399 (Nev. 1963).

18 513 P.2d 1234 (Nev. 1973).

19 2017 WL 4560140, at *10.

relationship between the buyer and others (such as family, friends, or employees of the buyer) who may be injured by a defective product.[20]

Long and *Amundsen* both involved ***horizontal*** privity. In *Long*, the plaintiff was injured when the ladder he was standing on broke, and in *Amundsen* the plaintiff, a lineman for the power company, was injured when the basket he was standing in to reach a high-voltage wire, collapsed from under him. In neither case had the plaintiff bought the product; his employer had and had merely provided the product for its employees' use.

In *Long*, the Nevada Supreme Court, in construing the old Uniform Sales Act, held that the plaintiff's claims for breach of implied warranties were properly dismissed because the plaintiff was not the immediate buyer of the product that broke.[21] The court noted that the statutory terms "seller" and "buyer" "appear to have been drawn with the immediate parties to the sale (*or their legal successors in interest)* in mind."[22]

The supreme court distinguished *Long* in *Hiles Co. v. Johnston Pump Co.*[23] The plaintiffs in that case had leased a diesel engine. When the engine failed, they sued the equipment lessor and the manufacturer and seller of the part that failed, alleging claims for breach of warranties, among other things, and seeking damages for their economic losses. The part manufacturer moved to dismiss on the grounds that the plaintiffs lacked vertical privity with it. The court noted that "[o]ur uniform commercial code . . . is neutral on the requirement of *vertical* privity."[24] It distinguished *Long* and *Amundsen* on the

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[20] *See Hiles Co. v. Johnston Pump Co.*, 560 P.2d 154, 157 n.5 (Nev. 1977) (describing the difference between vertical and horizontal privity). Nevada law recognizes horizontal privity in the case of people in the buyer's family or household and guests in the buyer's home if it would be reasonable for the seller to expect that the person might use the product. *See* NEV. REV. STAT. § 104.2318.

[21] 382 P.2d at 402-03.

[22] *Id.* at 402 (emphasis added).

[23] 560 P.2d 154 (Nev. 1977).

[24] *Id.* at 157 (footnote omitted and emphasis added).

grounds that they involved horizontal, not vertical, privity.[25] It then said, "It is well established that vertical privity is not required in actions for personal or property injury caused by defective products."[26]

This Court followed *Hiles* in *Reed v. Arthrex*, the case involving a defective medical device inserted in the plaintiff, noting that, under *Hiles*, "Nevada law does not require vertical privity for breach-of-warranty actions seeking redress for personal or property injury caused by defective products."[27]

This case is controlled by *Reed* and *Hiles*, not *Finnerty* and *Long*.[28] The alleged lack of vertical privity does not bar the Plaintiff's claim.

Nevada's Uniform Commercial Code—Sales defines "Buyer" as "a person who buys *or contracts to buy* goods."[29]

Here, the Plaintiff, Mr. Claridge, was in the chain of distribution. He was the intended end user of the product. The doctor and health-care facility did not buy the pain pumps for their own use; they bought them to insert them into their patients following surgery, and they billed the patients for them. The patients were the ones who ultimately bought the pain pumps. The doctor or hospital was only acting as the agent for the patient in buying the pain pump.[30] Thus, the Plaintiff was the successor-in-

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[25] *Id.*

[26] *Id.* (footnote and citations omitted).

[27] 2017 WL 4560140, at *10-*11 (citations omitted).

[28] *Gillson v. City of Sparks*, No. 03:06-CV-00325-LRH-RAM, 2007 WL 839252 (D. Nev. Mar. 19, 2007), another case Stryker relies on, is also distinguishable. That case involved no privity at all—neither vertical nor horizontal. The court in that case held that the representative of a man who died after being Tasered by law enforcement officers could not maintain a claim for breach of implied warranty because there was no privity of contract between the decedent and the defendant county whose law enforcement office had purchased the Taser. *Id.* at *13-*15. The decedent was neither the purchaser nor a user of the product (rather, he had it used *on* him), and he was not in privity with anyone in the distribution chain.

[29] NEV. REV. STAT. § 104.2103(1)(a) (emphasis added).

[30] *See, e.g.*, 3A DAVID FRISCH, LAWRENCE'S ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-318:54 (3d ed.) (a physician can be considered the agent of the patient with respect to statements by the seller, and the requirement of privity can be met where a distributor becomes the agent of one of the parties to the sale) (citations omitted).

interest to the immediate buyers of the pain pumps and can recover for breach of implied warranties under Nevada law even if vertical privity were required.

I-Flow also argues that the Plaintiff's implied warranty claims are insufficiently pleaded because they do not allege how any implied warranty was broken. The Complaint alleges, among other things, that Defendants represented that pain pumps could appropriately be used in or near the shoulder joint; that their pain pumps are designed to be used with commonly used anesthetics over the course of two days or more; that the continuous injection of such medications directly into the shoulder joint can cause permanent damage to the shoulder joint cartilage; that Plaintiff's surgeon used the pain pumps in the manner directed by Defendants; that the pain pumps destroyed Plaintiff's left shoulder; that Defendants impliedly warranted that their pain pumps were reasonably fit for the ordinary purposes for which they were intended (namely, to provide safe and effective post-operative pain relief); that the pain pumps were not reasonably fit for the ordinary purpose for which they were intended; that the Defendants knew or had reason to know of the particular purpose for which Plaintiff and his surgeon wanted the pain pumps, namely, to aid in Plaintiff's healing following shoulder surgery; that Plaintiff and his surgeon were relying on Defendants' skill or judgment to furnish a suitable product; and that Defendants' pain pumps were not fit for the particular purpose for which Plaintiff and his surgeon required them.[31] These allegations, construed in the light most favorable to Plaintiff, clearly state claims for breach of the implied warranties of merchantability and fitness for a particular purpose under Nevada law.[32]

Because Plaintiff has sufficiently alleged claims for breach of implied warranties and because vertical privity is not required here, the Court should deny the Defendants' motions to dismiss Plaintiffs' implied warranty claims.

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[31] *See* Compl., doc. 1, at 3-5, ¶¶ 9-13, 19; 11, ¶¶ 60-62; & 12, ¶¶ 64-67.

[32] *See* NEV. REV. STAT. §§ 104.2314(2)(c) & (f) & 104.2315.

III. The Plaintiff Has Sufficiently Pleaded His Misrepresentation and Fraudulent Concealment Claim.

Defendants have moved to dismiss Plaintiff's sixth cause of action, for misrepresentation and fraudulent concealment, on the grounds that it is not pleaded with sufficient particularity under Rule 9(b), which requires a party alleging fraud to "state with particularity the circumstances constituting fraud."

Under Nevada law, intentional misrepresentation (fraud) is established by "(1) a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation, (2) an intent to induce another's reliance, and (3) damages that result from this reliance."[33] A claim for fraud may be based on either affirmative misrepresentations or on a failure to disclose material facts that "a party is bound in good faith to disclose."[34]

Plaintiff's complaint alleges that the Defendants engaged in a course of conduct designed to mislead the medical community, including Plaintiff's surgeon, Dr. Yee, into thinking that pain pumps could safely be used in the shoulder joint by concealing material facts. Specifically, the complaint alleges that the Defendants failed to disclose that their pain pumps were not cleared by the U.S. Food and Drug Administration for use in the joint space and that the FDA had, in fact, repeatedly rejected requests for permission to market the devices for orthopedic use or use in the joint space because of a lack of safety data, and that they failed to disclose that the anesthetic medications used with their pumps could be toxic to shoulder joint cartilage.[35] The complaint also alleges that the Defendants made affirmative misrepresentations. Specifically it alleges that, "[a]t all pertinent times, Defendants represented to the public and to health-care professionals that the pain pump was a safe and effective product used for post-operative pain management" in surgeries like Mr. Claridge's, that they had been used for years in other parts of the body and therefore were safe for use in the shoulder joint, that their use in the shoulder joint

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33 *Nelson v. Heer,* 163 P.3d 420, 426 (Nev. 2007) (footnote omitted).

34 *Id.* (footnote omitted).

35 *See* Compl., doc. 1, at 4, ¶¶ 14-15, 17-18; 8-9, ¶¶ 42, 46; 13-14, ¶¶ 69-70, 73; 15, ¶¶ 85-86.

had been tested and determined to be safe, and that the FDA had approved the use in some fashion or had not advised against or prohibited it.[36] The complaint further alleges that Defendants made the misrepresentations and omissions of material facts to physicians to induce them to choose their pain pumps for post-arthroscopic surgery pain relief, that they knew their misrepresenations and omissions were false, that their sales representatives routinely appeared in surgical operating rooms promoting the use of pain pumps to shoulder surgeons such as Dr. Yee (Mr. Claridge's surgeon), that they made the misrepresentations intentionally, recklessly, and without regard for their truth or failed to use reasonable care to determine whether the representations were true, that they intended the surgeons to rely on the misrepresentations and omissions, that Dr. Yee in fact reasonably relied on Defendants' misrepresentations and omissions, and that Mr. Claridge suffered lifelong injuries as a result.[37] Other courts have found such allegations sufficient to state a fraud claim.[38]

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[36] *See id.* at 4, ¶ 12; 13, ¶¶ 70-71.

[37] *See id.* at 13-15, ¶¶ 70, 72-83.

[38] *See, e.g., Gullett v. I-Flow Corp.*, No. 0:12-cv-00069-HRW, doc. 14, at *4-*6 (E.D. Ky. Feb. 21, 2013) (finding similar allegations satisfied Rule 9(b)); *Rossum v. I-Flow Corp.*, Civ. No. 09-3714 (JNE/LIB), doc. 93, 2011 WL 3274080, at *8-*9 (D. Minn. Aug. 1, 2011) (same); *James v. Stryker Corp.*, No. 1:10-CV-2082, doc. 24, 2011 WL 292240, at *5-*7 (M.D. Pa. Jan. 27, 2011) (same); *McIntosh v. Stryker Corp.*, Civ. No. 10-3419 (MJD/FLN), 2010 WL 4967820, at *3 (D. Minn. Dec. 1, 2010) (same); *Strong v. Stryker Corp.*, No. 0:10-cv-02315-MJD-FLN, doc. 25, 2010 WL 4967876, at *8-*9 (D. Minn. Dec. 1, 2010) (same). *See also Solvay Pharms., Inc. v. Global Pharms.*, 298 F. Supp. 2d 880, 885-86 (D. Minn. 2004) (an allegation that the defendants had been improperly marketing their products as "generic" versions of the plaintiff's drugs for "several years" was sufficient under Rule 9(b)); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1526 (D. Minn. 1989) (holding that a jury could reasonably conclude that the manufacturer of a medical device had intentionally misrepresented the safety of the device "by concealing a material fact" where the plaintiff alleged that representatives of the manufacturer had told doctors that its device was "excellent for use" with women who had not given birth before and that it was "safe and effective"); *Yarrington v. Solvay Pharm.*, No. A05-2288, 2006 WL 2729463, at *4 (Minn. Ct. App. 2006) (where the plaintiff had alleged that the defendant made representations that its product was "indicated" for certain symptoms and that these representations "deceive[d] physicians and consumers into believing that" the product was an FDA-approved drug and where she identified "only one, alleged actual misrepresentation" by the defendant about the drug's FDA approval status, she "alleged the circumstances constituting fraud with sufficient particularity to satisfy the heightened pleading requirement" of Minnesota's equivalent of Rule 9(b)).

Defendants argue that Plaintiff's misrepresentation and fraudulent concealment claim is deficient because it does not spell out "the who, what, when, where, and how" of the misconduct.[39] However, the court must interpret the requirements of Rule 9(b) "in harmony with the principles of notice pleading."[40] The purpose of Rule 9(b) is to apprise the defendant of the claims against it and the factual basis for those claims so that it can respond to and prepare a defense to the charges of fraud.[41] Consequently, "Rule 9(b) does not require that a complaint be suffused with every minute detail of a misrepresentation."[42] This is particularly true where, as here, the gravamen of the complaint "is the allegation of a fraudulent scheme on behalf of the defendants."[43] The Plaintiff's Complaint gives enough detail for the Defendants to understand the basis for the Plaintiff's fraud claim and to enable them to prepare responsive pleadings. As another court has said when faced with similar motions by Stryker:

> Here, [Plaintiff] clearly plead[ed] sufficient facts to put Stryker on notice of the basis for the fraud claim[] against it. Although [the plaintiff does] not provide the specific dates and places that Stryker provided misrepresentations to [the plaintiff's] surgeon, in the context of this case, in which no discovery has yet occurred and the representations were made by Stryker to a third party--Plaintiff's surgeon--the type of allegations made here are sufficient. . . . The allegations in the Complaint give Stryker ample notice of Plaintiffs' claims and the bases for those claims.[44]

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[39] Doc. 16, at 7 (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)).

[40] *E.g., Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1298.

[41] *E.g., Commercial Prop. Invs., Inc. v. Quality Inns Int'l, Inc.,* 61 F.3d 639, 646 (8th Cir. 1995); *Scalia v. Cnty. of Kern*, 308 F. Supp. 3d 1064, 1072 (E.D. Cal. 2018) (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009)).

[42] *McIntosh v. Stryker Corp.*, Civ. No. 10-3419 (MJD/FLN), 2010 WL 4967820, at *3 (D. Minn. Dec. 1, 2010) (citations omitted). *See also Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 989-90 (9th Cir. 2008) (a complaint is sufficient if it gives sufficient detail to give defendants ample notice of plaintiff's loss causation theory and some assurance that the theory has a basis in fact).

[43] *Mallen v. Alphatec Holdings, Inc.*, 861 F. Supp. 2d 1111, 1124-25 (S.D. Cal. 2012), *aff'd,* 607 Fed. Appx. 694 (9th Cir. 2015).

[44] *McIntosh,* 2010 WL 4967820, at *3 (citations omitted). *See also Mack v. Stryker Corp.*, Civ. No. 10-2993, 2010 WL 4386898, at *5 (D. Minn. 2010) ("At this stage of the litigation . . . it is not clear what other allegations Defendants would have [the plaintiff] include in her fraud claims. She does not yet have access to evidence; discovery has not commenced. Her claims are sufficient to withstand Defendants' Motion to Dismiss."); *McGregor v. Uponor, Inc.*, Civ. No. 09-1136 ADM/JJK, 2010 WL 55985, at *4-5 (D. Minn. Jan. 4, 2010) ("a plaintiff is not required to plead the exact dates on which misrepresentations were made"; a complaint alleged negligent misrepresentation, a fraud-based claim,

Defendants are in a better position than the Plaintiff to know which of their sales representatives spoke with Plaintiff's surgeon, Dr. Yee, and to know what they told or didn't tell him. Under these circumstances, "primary reliance should be placed on the discovery process for uncovering the factual details."[45]

Even if the Defendants did not explicitly tell Dr. Yee that it was safe to use pain pumps in the shoulder joint, they implicitly told him as much. They were selling the pumps for orthopedic surgery, knowing that Dr. Yee was doing procedures in the shoulder joint space. Implicit if not explicit in their sales presentations was the representation that the pumps were safe for use in orthopedic surgery and, in particular, for surgery in the shoulder joint, since Defendants could not actively market their pumps for such use without FDA approval and to obtain such approval they had to establish the safety and efficacy of the pumps for that use.

On Defendants' motion to dismiss, the Court should hold that Plaintiff has sufficiently alleged a claim for misrepresentation and fraudulent concealment and allow the Plaintiff to proceed with discovery to determine further details of the Defendants' misrepresentations and concealment.

IV. The Court Should Not Strike the Plaintiff's Prayer for Punitive Damages.

Defendants ask the Court to dismiss the Plaintiff's "punitive damages claim" on the grounds that Plaintiff "has not and cannot properly plead the recovery of punitive damages." The bases for the motions are unclear. Stryker's motion says that "Stryker will further move this Court for an Order,

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with sufficient particularity where it alleged that the defendants made misrepresentations "in advertising, marketing, and promotional materials, on [the defendants'] websites . . . and through sales representatives").

[45] 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1298. *See also Odom v. Microsoft Corp.*, 486 F.3d 541, 554-55 (9th Cir. 2007) (when the alleged fraud does not become apparent until months later, the plaintiff is not required to identify the particular employee who made the fraudulent representation); *Concha v. Ondon*, 62 F.3d 1493, 1503 (9th Cir. 1995) (Rule 9(b) only "requires that plaintiff specifically plead those facts surrounding alleged acts of fraud to which they can reasonably be expected to have access"); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989) (Rule 9(b) "may be relaxed as to matters within the opposing party's knowledge").

pursuant to Rule 12(f)" striking Plaintiff's "claims for Punitive Damages,"[46] but the only rule referenced in the argument on punitive damages is Rule 9(b), relating to pleading fraud.[47] A motion to strike under Rule 12(f) "is not a procedural tool available to strike a request for relief."[48]

The only rules I-Flow cites are Rule 8, requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief," and Rule 12(b)(6), which governs motions to dismiss for failure to state a claim.[49]

As both Defendants recognize, punitive damages are not a claim for relief but a remedy that the Court may impose upon a finding of liability.[50] For that reason, the Plaintiff did not plead punitive damages as a separate cause of action but only included sufficient allegations to show his entitlement to punitive damages[51] and asked for them in his prayer for relief.

Under Rule 54(c), every final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Thus, the Plaintiff can recover punitive damages if the evidence at trial supports an award of punitive damages, even if he had not asked for them in his prayer for relief. So Defendants' motions are premature. If the evidence at trial can support an award of punitive damages, the Court must allow the jury to decide the issue, regardless of whether the request for punitive damages remains in the complaint or not.[52]

In any event, the Plaintiff has sufficiently pleaded a basis for punitive damages. Under Nevada law, punitive damages are available where it is shown by clear and convincing evidence "that the

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[46] Doc. 16, at 2.

[47] *See id.* at 11.

[48] *Bocock v. Specialized Youth Servs. of Va.*, Civ. No. 5:14cv00050, 2015 WL 1611387, at *3 (W.D. Va. Apr. 10, 2015). *See also Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 971 (9th Cir. 2010) (Rule 12(f), governing motions to strike, "does not authorize a district court to strike a claim for damages on the ground that such damages are precluded as a matter of law").

[49] *See* doc. 19, at 1, 9-10.

[50] *See* doc. 16, at 9-10 (citations omitted); doc. 19, at 13 (citations omitted).

[51] *See* Compl., doc. 1, at 16-17, ¶¶ 90-93.

[52] *See, e.g., Guillen v. Kuykendall*, 470 F.2d 745, 748 (5th Cir. 1972).

defendant has been guilty of oppression, fraud or malice, express or implied."[53] "Oppression" means "despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person."[54] "Fraud" means "an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person."[55] And "malice, express or implied," means "conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others."[56] ("Despicable conduct" is not defined in the statute.) A "conscious disregard of the rights" of another can satisfy both the "oppression" and the "malice" prong of the punitive damage standard, and "conscious disregard" is defined as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences."[57]

Plaintiff has alleged that Defendants' acts and omissions show that they acted with oppression, fraud, or malice, express or implied, that Defendants' conduct was willful and malicious or intentionally fraudulent, or that they engaged in despicable conduct with a conscious disregard of the rights or safety of others, including Plaintiff.[58] For the reasons stated in point III, *supra*, the Plaintiff has sufficiently alleged "fraud" within the meaning of the statute. He has alleged that the Defendants represented that their pain pumps were safe and effective and could be safely used to manage post-operative pain in patients undergoing shoulder surgery, when they knew as early as 1999 that their pain pumps had not been approved by the FDA for use in the shoulder joint space because of a lack of safety data, knew that the safety of their pain pumps for orthopedic and joint-space use had not been established, and knew or should have known that the anesthetic medications that would be used with the pumps could be toxic to

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53 NEV. REV. STAT. § 42.005(1).
54 *Id.* § 42.001(4).
55 *Id.* § 42.001(2).
56 *Id.* § 42.001(3).
57 *Id.* § 42.001(1).
58 *See* Compl., doc. 1, at 16-17, ¶ 93.

shoulder joint cartilage. Yet they actively marketed and promoted their pain pumps specifically for orthopedic, joint-space use without warning the public that the safety of pain pumps for joint-space use had not been established and without disclosing their dangers,[59] thereby depriving the Plaintiff and his surgeon of the right to make an informed decision about whether or not to use a pain pump. A jury could easily conclude that this conduct, coupled with Defendants' decision to market their pain pumps for orthopedic use without doing any testing to determine if the pumps were safe for that use, amounted to a conscious disregard of the safety of others, including the Plaintiff, and thus constituted "implied malice," at a minimum.

Because neither Rule 12(b)(6) nor Rule 12(f) is a proper means of challenging the Plaintiff's right to seek punitive damages and because the Plaintiff has sufficiently pleaded a factual basis for an award of punitive damages, the Court should deny Defendants' motions to the extent they are based on the Plaintiff's prayer for punitive damages.

V. Any Dismissal Should Be Without Prejudice.

Defendants ask the Court to dismiss the challenged claims and the prayer for punitive damages "with prejudice" and "without leave to amend."[60] They have not adequately explained, however, why the general rule should not apply. The general rule is that dismissal without leave to amend "is improper unless it is clear . . . that the complaint could not be saved by any amendment."[61] The only argument they offer is the bald assertion that "Plaintiff cannot invent or manufacture sufficient facts to maintain the claims and cause of action discussed herein."[62] But that does not mean that sufficient facts to maintain

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[59] *See, e.g., id.*, at 3-4, ¶¶ 12-18; 16-17, ¶¶ 90-93.

[60] *See* doc. 16, at 1, 11; doc. 19, at 15.

[61] *Manzarek*, 519 F.3d at 1031 (citations omitted). *See also* FED. R. CIV. P. 15(a)(2) (a court should "freely give leave [to amend a pleading] when justice so requires"); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (if dismissal under Rule 12(b)(6) is appropriate, a court "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts") (quotation marks and citation omitted).

[62] Doc. 16, at 11.

Plaintiff's claims do not exist or that the Plaintiff cannot *discover* sufficient facts. Plaintiffs in similar cases have prevailed against pain pump manufacturers on similar claims, and these Defendants have paid millions of dollars to settle similar claims. Plaintiff has not invented or manufactured any facts. If his complaint is somehow deficient in its factual allegations, he should be allowed to correct the deficiencies. The Court should not dismiss with prejudice without ever giving the Plaintiff a chance to remedy any alleged deficiencies and without ever seeing any proposed amended complaint.

CONCLUSION

The Plaintiff has adequately pleaded claims for breach of implied warranties and misrepresentation and fraudulent concealment and is entitled to ask for punitive damages at this stage of the litigation. The Court should therefore deny the Defendants' motions to dismiss and to strike. If the Court were inclined to grant any part of the Defendants' motions, it should only do so without prejudice and with leave to amend to correct any alleged deficiencies.

DATED this 14th day of January, 2019.

GLEN LERNER INJURY ATTORNEYS

/s/ Corey M. Eschweiler
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of GLEN LERNER INJURY ATTORNEYS, and on the 14th day of January, 2019, I served the foregoing ***PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITITES IN OPPOSITION TO DEFENDANTS STRYKER'S AND I-FLOW'S MOTIONS TO DISMISS AND STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service.

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